NORTHERN ELECTRIC COOPERATIVE, INC.

IBLA 81-723 Decided August 10, 1982

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting request for free use or reduced rental for powerline right-of-way M-49770.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Fees--Rights-of-Way: Federal Land Policy and Management Act of 1976

   Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976), the Secretary of the Interior may charge less than fair market value for a right-of-way rental under certain circumstances. The regulation, 43 CFR 2803.1-2(c), implementing that provision sets forth the circumstances under which no fee or a fee less than fair market rental may be authorized; however, it specifically excludes from such consideration cooperatives whose principal source of revenue is customer charges.

APPEARANCES: Matthew W. Knierim, Esq., Glasgow, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Northern Electric Cooperative, Inc. (Northern), appeals from a letter-decision of the Montana State Office, Bureau of Land Management (BLM), dated May 11, 1981, rejecting appellant's request for free use of right-of-way M-49770.

On January 28, 1981, Northern applied, pursuant to section 501 of the Federal Land Policy and Management of 1976 (FLPMA), 43 U.S.C. § 1761 (1976), for a right-of-way for a 7.2 KV single phase, electric power distribution line to be connected with a proposed microwave tower at the Northern Border

Pipe Line Pumping Station. The length of the powerline was to be approximately 3-1/2 miles, situated in sec. 12, T. 33 N., R. 38 E., and secs. 1, 2, 4, 5, and 6, T. 33 N., R. 39 E., Principal meridian, Montana. Appellant submitted the application to the Montana State Office with a $200 filing fee.

By letter of April 22, 1981, BLM submitted to Northern two copies of a right-of-way grant offer with instructions that they be signed, if conditions stated therein were acceptable, and returned with a $25 minimum advance rental.

Northern responded by letter of May 5, 1981, requesting that BLM grant a waiver of rental fees pursuant to 43 CFR 2803.1-2(c)(2), because of its status as a nonprofit corporation. BLM subsequently rejected this request in its letter-decision of May 11, 1981, stating that right-of-way grants issued to cooperatives whose principal source of income was customer charges were governed by the provisions of 43 CFR 2803.1-2(c)(1).

BLM advised Northern that the advance rental payment could be made under protest so that the processing of the application and the construction of the powerline could continue while the rental issue is considered on appeal. Northern paid a total of $105 on June 1, 1981, under protest, having filed a notice of appeal of the BLM decision on May 15, 1981.

On appeal, appellant reiterates the arguments presented to BLM for waiver of a rental fee and states in pertinent part:

> The regulation quoted by Mr. Stark in his decision is somewhat confusing. Northern Electric is a non-profit corporation and it is also true that Northern Electric derives nearly all of its income from customer charges. Northern Electric submits that reasonable men might be confused by a regulation that seems to specifically allow the granting of "no-fee" status in one section and deny it in the next. If a regulation is confusing, the law directs that the confusion or ambiguity be resolved against those responsible for drafting it.
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> It should be remembered that the Act itself at 43 U.S.C.A., Section 1764(g) has no confusion or ambiguity. Northern Electric is a non-profit corporation under applicable state law. See Montana Code Annotated, Section 35-2-101 et. seq. and 35-18-101 et seq. Northern Electric provides on a non-profit basis "a valuable benefit to the public or to the programs of the Secretary concerned." The Rural Electrification Act is a flat declaration that the providing of electrical energy to rural America is a benefit to the people of the United States. In that regard, Northern Electric serves the Secretary of Agriculture in carrying out the purposes of the R.E.A. programs.
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> It would appear that the Department of Interior in adopting 43 C.F.R. 2803.1-2(c)(1) departed from the law as set forth in

> 43 U.S.C.A. 1764(g) with the words "excluding municipal utilities and cooperatives whose principal source of revenue is customer charges". The language is too broad and would arguably include Northern Electric, a nonprofit corporation providing benefits to the public and the R.E.A. program administered by the Secretary of Agriculture.

Appellant's right-of-way application was made pursuant to provisions of FLPMA, 43 U.S.C. § 1761(a) (1976), and the regulations governing right-of-way application procedures in 43 CFR Part 2800. We note that section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), provides in applicable portion as follows:

> (g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

On October 9, 1979, the Department published proposed rules governing rights-of-way. See 44 FR 58106 (Oct. 9, 1979). These proposed rules included responses to comments made regarding an "outline of procedures" for granting rights-of-way submitted to user groups, states, and other involved governmental agencies and interested public and private groups on November 14, 1977. In response to comments regarding entities entitled to free or lesser charges and in explanation of the proposed rules, the Department stated:

> Failure to charge fair market value provides a subsidy by all the public. It follows that free or lesser charges should be used only in those circumstances where all the public benefits from the use. Non-profit entities that are essentially tax or donation supported and which are engaged in a public or semi-public activity designed for the public health, safety or welfare will qualify for lesser charges. As a matter of equity, we believe it is inappropriate to charge lesser fees or grant free use when the holder is engaged in similar business and follows practices comparable to private commercial enterprises. For this reason, REA cooperatives and municipal utilities whose principal source of revenue is customer charges will, hereafter, be charged fair market value fees. [Emphasis added.]

44 FR 58112 (Oct. 9, 1979). The proposed rules were subsequently adopted as the final rules.

The applicable section of the regulation implementing the right-of-way provisions of FLPMA was promulgated on July 1, 1980. 45 FR 44526 (July 1, 1980). The regulation at 43 CFR 2803.1-2, reads in part:

> (c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:
>
> (1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.
>
> (2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.
>
> (3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary.

[1] The issue raised is whether appellant qualifies for no fee or a lesser fee under the statute and applicable regulation. This question has been considered by the Board previously. San Miguel Power Association, Inc., 64 IBLA 342 (1982); Tri-State Generation and Transmission Association, Inc., make such lesser charge than fair market value for grant of a right-of-way to a nonprofit corporation as he finds "equitable and in the public interest." 43 U.S.C. § 1764(g) (1976). Although appellant appears to be eligible for consideration under the statute for a reduced charge, the regulation specifically excludes cooperatives whose principal source of revenue is customer charges. 43 CFR 2803.1-2(c)(1). The preamble to the proposed regulation on this matter states that "REA cooperatives * * * whose principal source of revenue is customer charges will, hereafter, be charged fair market value fees." 44 FR 58112 (Oct. 9, 1979). This Board has held that the Secretary, through promulgation of the regulations, has indicated his intent to charge fair market value to cooperatives whose principal source of revenue is customer charges even though such a cooperative is a nonprofit corporation. San Miguel Power Association, Inc., supra; Tri-State Generation and Transmission Association, Inc., supra. The rationale cited above indicates that this regulation is neither arbitrary nor an abuse of the Secretary's discretion under the statute. This Board is without authority to disregard a duly promulgated regulation of the Department. See Colorado-Ute Electric Association, Inc., 46 IBLA 35 (1980), aff'd, Colorado-Ute Electric Association, Inc. v. Watt, Civ. No. 80-C-500 (D. Col. Feb. 3, 1982).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge